



FH

**STATE OF WISCONSIN  
Division of Hearings and Appeals**

---

In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CWA/172808

---

**PRELIMINARY RECITALS**

Pursuant to a petition filed March 11, 2016, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA), a hearing was held on May 18, 2016, at Oshkosh, Wisconsin.

The issue for determination is whether the respondent correctly reduced the petitioner's monthly Supportive Home Care hours from 174 hours to 27 hours per month for six months and 31.33 hours per month for the remaining six months.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED]  
Bureau of Long-Term Support  
1 West Wilson

Madison, WI

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. The petitioner is a resident of Winnebago County. He receives long-term care services through the IRIS waiver program.
2. The petitioner is a 19 year old diagnosed with the following conditions: hypoxic ischemic encephalopathy, seizure disorder, spastic quadriparesis, cerebral palsy, chronic respiratory failure, and chronic airway obstruction. He is tracheostomy dependent. He also has severe neuromuscular scoliosis, developmental delays, has a post gastrostomy tube for feedings, and is dependent on IV fluids as a supplement to his enteral feedings. He is on a ventilator 24 hours per day. He has significant scars associated with his ventilator dependence.
3. On February 26, 2015 IRIS sent the petitioner a Notice of Action stating that his Supportive Home Care (SHC) hours were reduced from 174 hours per month to 7.5 hours per month. This reduction was due to IRIS policy 6.4. This was a new policy that stated:

Wisconsin Medicaid covers private duty nursing (PDN) for participants with medical conditions that require eight or more hours of skilled nursing in a 24-hour period. PDN is defined under Wisconsin Administrative Code § DHS 107.12. PDN includes the skilled nursing services for ventilator-dependent for life support participants, as well as for participants not dependent on a ventilator. Participants with medical conditions requiring less than eight hours of skilled care in a 24-hour period are eligible for skilled nursing from a home health agency through Wisconsin Medicaid as defined under Wisconsin Administrative Code § DHS 107.11 (2a). IRIS Medicaid Waiver Participants qualifying for PDN must maximize the State Medicaid plan benefit prior to using IRIS waiver funds. [] If an IRIS participant is eligible to use this Medicaid State plan benefit, then the participant may not opt to use IRIS funds in lieu of the Medicaid card to pay for unlicensed staff or family to provide this or similar services. *IRIS Policy 6.4*.

4. The petitioner appealed this reduction to the Division of Hearings and Appeals arguing that the petitioner's mother should be able to continue to perform his skilled nursing care, and that the IRIS program should continue to pay for this care. These arguments were rejected by the undersigned ALJ in a proposed decision issued on August 26, 2015 under CWA/164417. The Department made some additions and modifications concluding that:

The petitioner may decline to accept a healthcare service that the petitioner does not desire, including state plan Medicaid care services. However, the petitioner is not then entitled to obtain waiver services to compensate for the declined state plan service. The IRIS program may not authorize or pay for home and community based waiver services that are intended to substitute for Medicaid state plan services.

5. The Department then remanded the case to IRIS to determine an appropriate authorization of hours of supportive home care for the petitioner. The final decision was signed and dated by DHS Deputy Secretary [REDACTED] on January 27, 2016.
6. Pursuant to Deputy Secretary [REDACTED] order the IRIS program met with the petitioner's mother to determine an appropriate number of supportive home care hours.
7. On March 4, 2016 IRIS sent the petitioner a Notice of Action stating that the supportive home care hours were reduced from 174 hours to 27 hours per month for six months. IRIS authorized 31.33 hours per month of supportive home care for the remaining six months allowing time for

shoveling and de-icing two ramps into the home. The petitioner uses a wheelchair, and needs these ramps to be ice and snow free.

8. On March 11, 2016 the Division of Hearings and Appeals received the petitioner's Request for Fair Hearing.

### **DISCUSSION**

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program. IRIS policies are found online at <http://www.dhs.wisconsin.gov/publications/P0/P00708.pdf>.

IRIS created a new policy for individuals who are eligible for Private Duty Nursing (PDN). The new policy states:

Wisconsin Medicaid covers private duty nursing (PDN) for participants with medical conditions that require eight or more hours of skilled nursing in a 24-hour period. PDN is defined under Wisconsin Administrative Code § DHS 107.12. PDN includes the skilled nursing services for ventilator-dependent for life support participants, as well as for participants not dependent on a ventilator. Participants with medical conditions requiring less than eight hours of skilled care in a 24-hour period are eligible for skilled nursing from a home health agency through Wisconsin Medicaid as defined under Wisconsin Administrative Code § DHS 107.11 (2a). IRIS Medicaid Waiver Participants qualifying for PDN must maximize the State Medicaid plan benefit prior to using IRIS waiver funds. [] If an IRIS participant is eligible to use this Medicaid State plan benefit, then the participant may not opt to use IRIS funds in lieu of the Medicaid card to pay for unlicensed staff or family to provide this or similar services. *IRIS Policy 6.4*.

This policy section goes on to note that 42 CFR § 440.180 defines Home and Community based services, which are the services provided through the IRIS waiver program as “services, not otherwise furnished under the State’s Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter. *IRIS Policy 6.4*.

This policy was discussed at length in a final decision issued by a Deputy Secretary from the Department of Health Services in CWA/164417. That case involved this same petitioner. In that case IRIS reduced the petitioner’s monthly SHC hours from 174 to 7.5 hours. IRIS reasoned that the petitioner is a severely disabled 19-year-old who requires a very high level of care. He is a quadriplegic who has a tracheotomy, is tube fed, and is ventilator dependent. Thus far, his mother has been providing his care; however, given the petitioner’s condition, he would be eligible for Private Duty Nursing (PDN) through MA card service. They then reduced the SHC provided by the petitioner’s mother to 7.5 hours per month with the remaining time would be covered through PDN services.

The petitioner’s mother chose, and continues to choose, not to hire a PDN. She prefers to continue to provide her son’s care. This situation was discussed in the previous decision. The Deputy Secretary concluded:

The petitioner may decline to accept a healthcare service that the petitioner does not desire, including state plan Medicaid card services. However, the petitioner is not then entitled to obtain waiver services to compensate for the declined state plan service. The

IRIS program may not authorize or pay for home and community based waiver services that are intended to substitute for Medicaid state plan services.

The Department remanded the case back to IRIS stating:

This matter needs to be remanded to the program to determine the appropriate number of hours of SHC to be authorized for the petitioner. The program may not determine the SHC hours through its assessment tool as if the petitioner receives PDN services; those services have clearly been declined for now. The petitioner could elect to be assessed for PDN or skilled nursing care. If it is determined that he is not actually eligible for these services, then it would appear likely that the previous authorization for SHC hours was an appropriate one. However, the petitioner may not substitute waiver services to compensate for appropriate but declined state plan series. **To the extent that he previously authorized SHC service time was spent on care or services that were either essentially skilled care or an integral part of the provision of a skilled care service, those services are not separately reimbursable and the SHC authorized hours may be reduced accordingly.** I assume, without deciding, that the resulting number of SHC hours authorized may be somewhat less than the authorized 174 hours per month, but would very likely be more than the 7.5 hours per month for housekeeping and laundry that the IRIS program reduced the petitioners' authorization to (emphasize added).

After the case was remanded, IRIS met with the petitioner and his mother. His mother provided a list of tasks that she performs. Included on the list was the length of time she spends performing these various tasks. IRIS concluded that the petitioner's mother was entitled to 27 hours per month for six months, and 31.33 hours per month for the remaining six months. This extra time is for the petitioner's mother to shovel and de-icing two ramps into the home during the winter months.

IRIS covers SHC services for recipients. SHC is defined as "the provision of a range of services for participants who require assistance to meet daily living needs, to ensure adequate functioning in the participant's home, and to support safe access to the community." *IRIS Supportive Home Care Policy*. The policy goes on to list SHC services to include Personal Services and household services. *Id.* The policy discusses different levels of services stating that a lower rate of pay can be negotiated for some services like companionship care services. *Id.* Finally, the policy specifically **excludes services available through the Medicaid State Plan**. *Id.* (emphasize added). There is an IRIS Supportive Home Care Hours Assessment Tool, which estimates the number of hours based upon the IRIS SHC policy.

In this case the Supportive Home Care tool estimated that the petitioner needed 7.5 hours per month of SHC services. In addition to this time the petitioner's mother receives 175 hours per month of Personal Care Worker (PCW) time through the Medicaid State Plan. The petitioner would also be eligible for PDN services through the Medicaid State plan except his mother has declined those services.

Following the prior final decision, IRIS recalculated additional time in addition to the PCW time and SHC calculated time. They did this by examining a list that the petitioner's mother provided of all of the chores she completes in a day. Looking at the list of tasks they allowed additional time for the care of the petitioner's cat, shoveling, de-icing, and mopping during the winter months, breaking down boxes from the petitioner's supplies deliveries, cleaning the toilet and floor in the petitioner's bathroom, cleaning common areas of the home that the petitioner and the family use, playing zills, drums, and dancing for/with the petitioner, and time for shopping and ordering the petitioner's supplies. This totaled 27 hours per month for six months and 31.33 hours per month for the remaining six months. The additional time is during the winter months. This time is in addition to the 175 hours per month of PCW time.

The petitioner argued that any reduction in supportive home care hours from the previously authorized 174 hours was incorrect. Despite the prior final decision, the petitioner still believes that he qualifies for 174 hours per month of SHC through IRIS. He has not requested prior authorization for PDN or other skilled nursing care. Instead he argues that IRIS must pay his mother for supervision time because he does not have a PDN or other skilled nursing care. This notion that the petitioner requires 174 hours per month of SHC was already rejected by the Department in the previous final decision. The only issue is whether 27 hours per month for six months and 31.33 hours per month for the remaining six months is correct. I find that those hours are correct. These hours are approximately 4 times the estimated time on the SHC tool. In addition to these hours the petitioner's mother receives 175 hours per month as the petitioner's PCW through the state Medicaid plan.

The petitioner finally argues that IRIS' policy 6.4 violates the American with Disabilities Act (ADA). As an ALJ, I have no jurisdiction to address this issue. I nonetheless note that I reviewed the case included in the petitioner's materials. I disagree with the petitioner's reading. Factually that case was very different from this case. Unlike the petitioner, those waiver recipients had not declined available Medicaid State Plan services.

### **CONCLUSIONS OF LAW**

The respondent correctly reduced the petitioner's monthly Supportive Home Care hours from 174 hours to 27 hours per month for six months and 31.33 hours per month for the remaining six months.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

### **REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

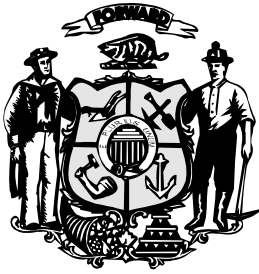
...

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 24th day of June, 2016

---

\sCorinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAmail@wisconsin.gov](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on June 24, 2016.

Bureau of Long-Term Support  
Attorney [REDACTED]